United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7581

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

INEZ H. LENFEST and MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK, as Executors of the Estate of Harold C. Lenfest, and KENNETH F. YARRINGTON,

Plaintiffs-Appellees,

against

HAROLD W. COLDWELL,

Defendant-Appellant.

FERRO-BET CORPORATION OF AMERICA,

Plaintiff-Appellee,

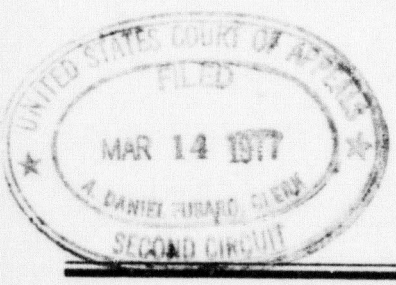
against

HAROLD W. COLDWELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR HAROLD W. COLDWELL DEFENDANT-APPELLANT



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Statement.

The joint brief of plaintiffs-appellees does not meet the contentions raised by appellant Coldwell that items for crew wages at Baltimore, costs of deviations to the Azores and Bermuda, "survey fee" by the Shipowner himself,

and certain routine maintenance items should not have been allowed for ascertainment of whether there was a constructive total loss at Baltimore. Plaintiffs-appellees also raise for consideration certain matters already ruled upon by this Court, and other rulings of the District Court as to which no appeal has been taken.

POINT I.

Consideration of issues raised by the appeal.

Plaintiffs-appellees have failed to justify the allowance of crew wages and provisions at Baltimore ($9,281.18). The services of the crew were not required for custodial and maintenance purposes, for the complete custody of the shipyard was adequate and no maintenance was done (273a).* A dock trial normally comes after completion of repairs. There is no evidence as to actual dock trials (if any). The District Court based its allowance solely upon alleged consequential economic loss which would have resulted from replacement of crew (87, 88a). This was in accordance with the testimony of Grundvig, president of plaintiff Ferro-Bet (51, 52a). As shown in defendant-appellant's main brief, and as stated by this Court, 525 F. 2d at 725, the crew rendered no services which were "necessary in connection with the repair of the vessel".

As to costs for deviations to the Azores and Bermuda ($7,113.71; 85a), defendant-appellant's showing that the calls were solely for purpose of replenishing fuel and water has not been controverted (see Master's statement to shipowner, 309a).

As to survey fees, the Average Adjusters Association Rule of Practice may not be read to refer to *any* classification society, of which there are a number. On principle it

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* References, except as otherwise noted, are to the Joint Appendix, the contents of which have been agreed upon by all the parties.

must be deemed to refer to the society in which the vessel was classed. As shown in defendant-appellant's main brief this vessel was never classified with or by Bureau Veritas.

Nearly all the charges for repairs made at Baltimore were allowed by the District Court. Only a few (4, a total of $2,333.50) have been objected to. These were for maintenance items for work which must have been apparent at the survey and which were neither included in the Salvage Association records or called to the attention of the Salvage Association as requested by the adjuster (196a). They remain unsubstantiated as casualty repairs.

POINT II.

The denial of the "Port Disbursements" item of $11,098, the denial of a contingency allowance, and the ruling of the District Court that the amounts paid by hull insurers to shipowner were not in settlement of a constructive total loss claim, i.e., that there was no arranged or compromised total loss were correct.

As to the $11,097.96 "port disbursements" item the District Court held that before an expenditure can be said to be properly allowed it must be connected to the repairs and that no explanation of the item was forthcoming (86a). The District Judge was correct. Mr. Bowser, plaintiffs-appellees' expert who had reviewed the claim documentation, testified (61, a):

> Q. But you have no idea of what the components of the $11,097.96 figure are?
>
> A. That is correct.

The matter of contingency allowance was considered by this Court, 525 F. 2d at page 725 and footnote 17. No such claim was presented or substantiated (see Plaintiff's Exhibits 27 and 28, 237 and 343a).

The matter of arranged or compromised total loss was correctly and summarily disposed of by the District Court (83, 84a), which referred to the owner's average adjuster's testimony that no claim for constructive total loss was ever submitted to hull underwriters (68, 69a). Unless a claim for constructive total loss has been made, there can be no "Arranged and/or Compromised Total Loss", *Oscar L. Aronsen, Inc.* v. *Compton,* 370 F. Supp. 421, 427 (S.D.N.Y. 1973), aff'd 495 F. 2d 674 (2d Cir. 1974); *Gurney* v. *Grimmer,* 44 Ll. L. Rep. 189 (Court of Appeal, England 1932), 38 Com. Cas. 7.

CONCLUSION.

The decision of the court below granting plaintiffs judgment on their complaints should be reversed.

Respectfully submitted,

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Dated: New York, New York
14 March 1977.

(61214)

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the within Appy Brief is

hereby admitted this 1st day

of March, 1977

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the within is

hereby admitted this 14th day

of March, 1977

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